

STATE OF MICHIGAN
COURT OF APPEALS

BELLMAN OIL COMPANY, INC.,

Plaintiff-Appellant,

v

EVAN WARD KNOLL,

Defendant-Appellee.

UNPUBLISHED

July 22, 2003

No. 238017

Van Buren Circuit Court

LC No. 01-047855-CK

Before: Zahra, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff sold gasoline products to Hickmott Oil Company pursuant to a written contract effective for a one-year term. Defendant signed a guaranty relating to Hickmott Oil's obligations under the contract. However, the guaranty as written provided that plaintiff guaranteed payment of Hickmott Oil's debt to plaintiff. The trial court granted defendant's motion for summary disposition because the guaranty did not state that defendant would pay Hickmott Oil's debt, but granted plaintiff fourteen days in which to amend its complaint to plead a claim for reformation of the guaranty. The court also ruled that even if the guaranty were reformed, defendant could only be held liable for debts incurred during the one-year term of the contract.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 201 (1998). Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith, supra* at 455.

Plaintiff first contends that the trial court should not have granted defendant's motion subject to leave to amend because a claim for reformation did not have to be specifically pleaded

in the complaint. We disagree. At the hearing on the motion, plaintiff's counsel expressly requested leave to amend to plead a claim for reformation and "a party cannot request a certain action of the trial court and then argue on appeal that the action was error." *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

We agree, however, that the trial court should not have dismissed the action on the basis that the amendment was untimely. A court speaks through its written orders and judgments, not through its oral pronouncements. *Hall v Fortino*, 158 Mich App 663, 667; 405 NW2d 106 (1986). Because plaintiff filed its amended complaint before an order reflecting the court's ruling was entered, plaintiff did not violate the order.¹

Plaintiff next contends that the trial court erred in restricting any recovery under the guaranty to the debt incurred during the one-year term of the contract. We agree. Although the contract provided that it could not be modified except in writing, the law is clear that such a clause "although frequently seen" is "wholly nugatory." *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 601; 576 NW2d 392 (1997).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens

¹ Regardless, in light of the ambiguity in the trial court's oral pronouncement, we are not persuaded that plaintiff failed to comply with it by serving, rather than filing, the amended complaint within fourteen days of the hearing.